

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

—————  
Certiorari to Horry County

Honorable Kristi F. Curtis, Circuit Court Judge  
—————

**RECEIVED**

**Oct 30 2020**

S.C. SUPREME COURT

ARMANDO K. CHESTNUT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-000412  
—————

PETITION FOR WRIT OF CERTIORARI  
—————

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## **ISSUE PRESENTED**

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when she waived Petitioner's right to a pretrial immunity hearing pursuant to the Protection of Persons and Property Act where Petitioner was prejudiced since if counsel had not waived the pretrial hearing there is a reasonable probability the trial judge would have granted Petitioner immunity from prosecution and found he lawfully acted in self-defense and the defense of others when he fired the shots that struck the decedent and injured another combatant?

## STATEMENT OF THE CASE

The state alleged that Petitioner shot and killed Jamal McFadden and injured Damien Canty after a fight broke out at the 3rd Avenue Sports Bar in Myrtle Beach during the early morning hours of March 6, 2012. App. 1110-1113. Petitioner maintained he acted in self-defense and the defense of others after a group of men from Hemingway attacked his friends, Dewayne Durant, also known as Thoro, and Corey Myers, after a dispute over a game of pool.

Wayne Feaster was the owner of the 3rd Avenue Sports Bar. App. 127, l. 12 – 128, l. 15. Feaster remembered that Monday, March 5, 2012, was “Jamaica Night.” App. 129, ll. 20-23. He claimed his bouncers searched everyone that night and every night before they entered the club. He also had twelve security cameras inside and outside the bar. App. 132, l. 15 – 133, l. 21.

During the early morning hours, an argument started about a pool game between the “Myrtle Beach crowd against the Hemingway crowd.” App. 131, ll. 2-15. Feaster explained, “I seen them over there arguing at a pool table and then they start fighting, pushing and stuff. I went over there and escorted them outside.” App. 132, ll. 2-8. Jamal McFadden, the decedent, grabbed a pool stick during the altercation and wielded it at others before someone tussled it from his grasp. App. 137, ll. 5-13; App. 167, l. 7 – 168, l. 10.

Fester testified that after he escorted the patrons involved in the altercation outside, he saw Thoro, a friend of Petitioner, get struck with a beer bottle. App. 135, ll. 5-9. Feaster acknowledged that Thoro had left the bar and walked to his car before he was attacked. App. 168, l. 18 – 169, l. 4. He identified Damien Canty, who Petitioner later shot in the elbow, as the individual who struck Thoro in the head with a bottle. App. 169, ll. 5-17. Thoro went “down pretty hard.” App. 169, ll. 13-19. Feaster admitted that three to four men then “jumped on” Thoro. App. 170, ll. 13-20.

After Thoro was attacked, “Everybody start[ed] fighting.” Feaster saw “a gun go up in the air.” App. 135, ll. 16-20. He also “thought” he heard a gunshot. App. 135, l. 24 – 136, l. 3. Feaster admitted that after watching the videotape of the altercation his memory of what he thought had happened was not as clear anymore. App. 135, l. 24 – 136, l. 8. He identified Corey Myers as the individual he saw point and fire a gun into the air. Like Thoro, Myers was also attacked by the men from Hemingway and “went down.” App. 171, ll. 1-25.

Feaster identified McFadden, the decedent, as one of the men from Hemingway involved in the attack on Thoro and Myers outside. App. 174, l. 17 – 175, l. 9. However, Feaster did not see Petitioner shoot a gun that morning. App. 174, ll. 2-5.

Petitioner testified in his own defense. He told the jurors that he had lived in Myrtle Beach all his life. He lived only four or five minutes away from the 3rd Avenue Sports Bar. App. 720, ll. 4-11. He remembered on March 5, 2012 his girlfriend, Annaliese Testa, wanted to go to the 3rd Avenue Sports Bar, “and all the other clubs” that Petitioner frequented. App. 721, ll. 8-24. They first went to Sam’s Beer Garden, then to the Jet Age, and finally to the 3rd Avenue Sports Bar. They arrived about 12:30. App. 721, l. 25 – 722, l. 11.

When they first got to the 3rd Avenue Sports Bar “everything was cool.” Petitioner bought a couple drinks. He and Annaliese sat by the window while “some guys were shooting pool.” App. 722, l. 16 – 723, l. 20. Petitioner saw his friends Thoro, Michael Spivey, also known as “Gremlin,” and “Gucci” inside the bar. He also remembered seeing a lot of “Jamaican people.” App. 724, l. 1 – 725, l. 7.

Petitioner testified that Gucci was shooting pool, and he thought they were placing a “\$100 bet” on each game. “Gucci won the game” and “Thoro was wanting to bet more, wanted to bet on another game. . . he wanted to bet like two or three more hundred dollars on the next game. So they

got in an argument about that. The guy paid Gucci.” App. 725, ll. 2-23. Petitioner eventually walked over to the pool table and told Thoro to “chill out, man, like you got the money so why you steady arguing for. Like you won the bet so you got the money, leave it alone . . .” App. 726, ll. 5-22.

Petitioner walked back to his girlfriend and told her not to worry, that the men were just betting on the pool game, and that is why they started arguing. App. 727, 1-8. When Petitioner turned back around, the men were arguing again. App. 727, ll. 7-8. “The argument got real out of hand and then one of the guys grabbed a pool stick.” The man who grabbed the pool stick was a slim black man with dreadlocks. He was later identified as the decedent, Jamal McFadden. App. 727, ll. 9-21.

Petitioner referred the jury to the videotape of the incident. He told the jurors, “[I]f you watch the camera closely, you will see Michael Spivey come from the back of the pool table and grab the pool stick and then you see, well you see the bouncer and Mike get there about the same time, but Mike [is] right behind the guy with the pool stick.” App. 727, l. 9 – 728, l. 4.

Petitioner remembered that the arguing continued. He said, “I heard some guys was like saying they was going to get their guns and this and that, whatnot . . .” App. 728, ll. 8-18. As the fighting escalated, Petitioner did not notice that Thoro had left the bar. Petitioner’s girlfriend told him she thought Thoro had gone to the restroom. Petitioner continued to look for him. App. 728, l. 22 – 730, l. 24.

Petitioner did not see Thoro get hit in the head with the beer bottle, but he did see two or three men “jumping” on Thoro. App. 731, ll. 1-9. Petitioner told the jury that he had his “little gun” in his pocket the entire evening including when they went into the bar. He explained, “We never

got searched because I guess the bouncer wasn't there at the door at the time, so I walked right in with my pistol in my pocket." App. 731, l. 18 – 732, l. 7.

Petitioner went to his girlfriend's car during the altercation, and "I put the phone up and I put the weed up" in the car. Then he ran to help Thoro, and "I see Corey [Myers] got the gun in his hand. At first I didn't know it was Corey. I thought it was, I thought it was one of them but then I looked again and it was Corey. . . Corey was coming down hitting one of the guys with the gun. And when they fell . . . like before I turned this curve right here, a gunshot [went] off." Petitioner did not know who was shooting. App. 732, l. 9 – 734, l. 15.

Petitioner testified, "I was going over there to scare the guys off Thoro. But when I heard the gunshot, I shot and I hit Canty in the arm." App. 735, ll. 8-10. Petitioner did not know at the time that he had hit Damien Canty, but "everybody that was on Thoro and Corey backed off." App. 735, ll. 12-15. Petitioner shot because he was defending Thoro and Corey, who had come to Thoro's aid. App. 735, ll. 16-24. Petitioner testified that he shot only three times. He admitted he shot Canty in the elbow, and he also shot the window out of a van. App. 737, l. 5 – 738, l. 4.

After the shooting, Petitioner saw Canty going back into the bar. Petitioner followed him because he knew Canty was one of the individuals who attacked Thoro. App. 738, ll. 5-20. Canty "swung" at Petitioner and Michael Spivey hit Canty knocking him to the ground. App. 739, ll. 8-17. Petitioner then kicked Canty one time before Feaster pushed Petitioner away. App. 739, l. 22 – 740, l. 12. Petitioner's girlfriend was upset so "we got in the car and we left." App. 740, ll. 14-20.

Petitioner explained to his girlfriend that the men were jumping on Thoro, his friend, and he came to Thoro's aid. Petitioner said that Thoro could have been killed during this violent encounter. App. 740, l. 23 – 741, l. 21. Petitioner told his girlfriend he did not think he hit anybody "but I did scare everybody off Thoro." App. 741, ll. 1-21.

Petitioner’s girlfriend, Annaliese Testa, a state witness, confirmed that Petitioner later told her “they were arguing over the pool game and money and how the shooting happened outside and his friend was getting jumped. And I asked him if he fired his gun and he said yes.” App. 290, l. 20 – 291, l. 4. Annaliese said Petitioner told her that “he thought he fired it at the one with dreads . . . He told me he fired once.” App. 291, ll. 5-17. She did not know who the man with dreads was, but at the time of trial, she thought it might be Jamal McFadden. App. 291, ll. 9-14.

Annaliese, who was charged with accessory after the fact of murder, entered into a proffer agreement with the state with the assistance of her counsel, Fran Humphries, and agreed to testify for the state consistent with her prior statements to law enforcement. App. 273, ll. 5-12; App. 310, l. 18 – 312, l. 25. She expected “a good result” based on her testimony against Petitioner. App. 313, ll. 1-8.

The following morning, while Annaliese was driving Petitioner home, an unmarked police car began following them. App. 746, l. 1 – 747, l. 25. Petitioner said he was scared, and “I threw the gun out the window.” App. 748, ll. 4-8. A marked police car eventually pulled them over. Both Annaliese and Petitioner were arrested. Petitioner acknowledged he knew it was a crime to carry a gun, and that is why he discarded his weapon when he saw the police. App. 748, ll. 11-24.

Petitioner told the jury that he only went to the bar to have “a drink with my girlfriend,” that he did not expect anything to happen, and he only went to the aid of his friends. App. 767, l. 1 – 768, l. 18.

Trial counsel moved for a directed verdict on self-defense as a matter of law. She told the judge, “There’s clearly evidence of self-defense from their [the state’s] own witnesses, from Cory [Myers], from statements made by Mr. Feaster, who are the fact witnesses. And from obviously reviewing the video, there are issues of defense—of self-defense and defense of

others.” App. 556, l. 16 – 557, l. 18. The judge denied the directed verdict motion after a lengthy ruling. App. 560, l. 3 – 562, l. 8.

A Horry County Grand Jury indicted Petitioner in August 2012 for murder, attempted murder, pointing and presenting a firearm, and second degree assault and battery by mob as a result of the altercation that occurred that morning. App. 1110-1117. Petitioner’s case was called to trial on July 15, 2013 before the Honorable Steven H. John, and a jury. App. 1. Assistant Solicitors Brad Richardson and Travis Hyman represented the state. App. 1. Barbara Pratt represented Petitioner. App. 1.

After jury selection, trial counsel informed the judge that she had discussed with Petitioner before lunch that day, the first day of trial, whether to pursue a pretrial hearing pursuant to the Protection of Persons and Property Act, specifically S.C. Code Ann. § 16-11-440(C), reviewed with him our Court of Appeals’ opinion in State v. Marin, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013), and finally, that the pair had decided to waive the pretrial hearing. App. 42, l. 12 – 43, l. 2. She explained:

The reasons for the waiver, first of all, *we do not believe that it would add anything to this particular case that we would not be able to ask in a later motion.* We also feel it’s a matter of strategy, Your Honor, and my client understands that he is giving up the right to have the Court determine whether he’s entitled to immunity. But as I’ve explained to him, he’s not giving up his right to present the idea of self-defense and defense of others to the jury throughout the trial.

App. 43, ll. 2-10 (emphasis added).

The trial judge then placed Petitioner under oath, and after explaining the relevant portions of the Act to him, asked Petitioner whether he wanted the judge to hold a pretrial hearing or waive his right to such a hearing. App. 43, l. 11 – 46, l. 23. Based on the advice of counsel, Petitioner stated, “I give up the hearing, sir.” App. 46, l. 24.

On July 19, 2020, the jury found Petitioner guilty of the lesser included offense of voluntary manslaughter, the lesser included offense of second degree assault and battery, and as indicted for attempted murder and pointing and presenting a firearm. App. 949, l. 14 – 950, l. 24. He was sentenced to life without parole for voluntary manslaughter and attempted murder pursuant to S.C. Code Ann. § 17-25-45, five years for pointing and presenting a firearm, and three years for second degree assault and battery. App. 974, l. 15 – 975, l. 6.

The Court of Appeals affirmed Petitioner’s convictions and sentence. State v. Chestnut, 2016-UP-227 (S.C. Ct. App. filed June 1, 2016).

On December 7, 2016, Petitioner filed an application for post-conviction relief. App. 1039-1045. The state filed a return to this application dated October 24, 2017. App. 1046-1053. With the assistance of counsel, Petitioner filed an amended application on October 17, 2018 raising the claim argued in this petition. App. 1054-1056. An evidentiary hearing was held on November 26, 2018 before the Honorable Kristi F. Curtis. App. 1057. Assistant Attorney General Johnny Ellis James, Jr. represented the state. App. 1057. Daniel A. Selwa, II represented Petitioner. App. 1057.

At the evidentiary hearing, Petitioner testified that he was not familiar with the Protection of Persons and Property Act before his trial. He explained that he waived his right to a pretrial immunity hearing based on the advice of his counsel. App. 1065, ll. 5-19. Petitioner believed the main reason counsel wanted to waive the hearing was because she was not prepared and “we didn’t have all the witnesses at the time.” App. 1066, ll. 6-10.

Petitioner testified as to what occurred during the early morning hours at the 3rd Avenue Sports Bar. His account at the PCR hearing was consistent with his trial testimony. He asserted

that he acted in self-defense and the defense of others when he fired his weapon that morning. App. 1067, l. 4 – 1070, l. 21.

Based on his understanding of the Act now, Petitioner believed he would have been found immune from prosecution by the trial judge had counsel not advised him to waive his right to the pretrial hearing. App. 1072, ll. 12-20.

Barbara Pratt, Petitioner’s trial counsel, admitted that she had not considered requesting a pretrial immunity hearing pursuant to the Act until Judge John, the trial judge, brought it to her attention on the first day of trial. App. 1081, ll. 5-9. Judge John “wanted to know if we were going to have that hearing or whether we were going to waive it, and wanted to particularly call our attention to subparagraph (C) [S.C. Code Ann. § 16-11-440(C)], which speaks to the fact that if a person is in any place with the right to be there that that could create a situation of immunity.” App. 1081, ll. 9-14. Pratt maintained her biggest concern with requesting a pretrial hearing was that if Judge John denied immunity then the defense would have already “laid . . . all the testimony out.” The state would have heard Petitioner’s testimony and the other defense witnesses’ testimony before the trial even started. App. 1081, l. 15 – 1082, l. 19.

Pratt admitted the underlying facts of Petitioner’s case supported immunity from prosecution pursuant to § 16-11-440(C). App. 1084, l. 11 – 1085, l. 6. She testified, “[M]aybe I gave him bad advice in regards to 16-11-440(C). I had a reason behind it but, you know, I don’t know . . . you never know whether the Judge would’ve granted the immunity or not.” App. 1088, ll. 16-19.

By order filed February 11, 2020, the PCR judge denied Petitioner relief. App. 1096-1108. The judge found trial counsel was not ineffective for waiving Petitioner’s right to a pretrial immunity hearing pursuant to S.C. Code Ann. § 16-11-440(C). The judge concluded

counsel “reasonably weighed the likelihood of prevailing upon the immunity hearing against the strategic disadvantage of placing the defense case on the record prior to the prosecution presenting its case to the jury, and determined the more favorable course was to waive immunity, wait until after the State presented its case in chief, and only then seek to present the case for self-defense.” App. 1104-1105. The PCR judge further found trial counsel articulated a strategic reason for waiving the hearing and, consequently, the judge could not find she performed deficiently. App. 1105.

Finally, the judge asserted, “Even if Counsel had requested a pretrial determination of immunity under the ‘stand your ground’ statute, the facts would not have established by a preponderance of the evidence that [Petitioner] was entitled to immunity.” App. 1105. Therefore, the judge concluded Petitioner failed to prove prejudice. App. 1106.

Because Petitioner’s right to the effective assistance of counsel was violated when trial counsel erroneously advised Petitioner to waive his right to a pretrial immunity hearing pursuant to S.C. Code Ann. § 16-11-440(C), and since Petitioner was prejudiced because there is a reasonable probability the trial judge would have granted Petitioner immunity from prosecution, this petition for writ of certiorari follows.

## ARGUMENT

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when she waived Petitioner's right to a pretrial immunity hearing pursuant to the Protection of Persons and Property Act where Petitioner was prejudiced since if counsel had not waived the pretrial hearing there is a reasonable probability the trial judge would have granted Petitioner immunity from prosecution and found he lawfully acted in self-defense and the defense of others when he fired the shots that struck the decedent and injured another combatant.

Trial counsel was ineffective for waiving Petitioner's right to a pretrial determination of immunity from prosecution pursuant to the Protection of Persons and Property Act (the Act). Counsel admitted during the evidentiary hearing that she did not even consider seeking immunity pretrial until the trial judge raised the Act during an off the record status conference on the first day of trial. It was only after the jury had been selected and court had adjourned for lunch that counsel first advised Petitioner of his right to a pretrial immunity hearing and reviewed with him the applicable law. Given the late stage of the proceedings, it is undeniable that counsel was unprepared to present evidence during a pretrial immunity hearing, where Petitioner would have had the burden of proof, and properly argue Petitioner was entitled to immunity.

Petitioner was prejudiced by trial counsel's deficient performance because if counsel had not waived Petitioner's right to a pretrial determination of immunity, there is a reasonable probability given the evidence later presented during trial that the trial judge would have found Petitioner was entitled to immunity pursuant to the Act.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S.

668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

The Protection of Persons and Property Act provides that a “person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force.” S.C. Code Ann. § 16-11-450. Section 16-11-440(C) sets forth the circumstances under which the Act allows the use of deadly force. Id. This subsection states:

(C) A person who is not engaged in an unlawful activity and who is attacked in another place where he has the right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonable believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

Our Supreme Court emphasized in State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013) “that immunity under the Act ‘is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by a preponderance of the evidence,’ save the duty to retreat.” State v. Douglas, 411 S.C. 307, 318, 768 S.E.2d 232, 238 (Ct. App. 2014) (quoting

Curry, 406 S.C. at 371-372, 752 S.E.2d at 266-267). “[A] valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant’s entitlement to the Act’s immunity.” Id. at 318, 768 S.E.2d at 238 (quoting Curry, 406 S.C. at 371, 752 S.E.2d at 266) (alternation in original) (internal quotation marks omitted).

“There are four elements required by law to establish a case of self-defense: First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.” Id. at 318, 768 S.E.2d at 238-239 (internal citation omitted). As mentioned, the last element, the duty to retreat, need not be shown when seeking immunity under the Act. Id. at 318, 768 S.E.2d at 239 (citing Curry, 406 S.C. at 371, 752 S.E.2d at 266).

“Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense.” State v. Douglas, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998) (citing State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997)).

The evidence presented by the defense at trial, particularly the testimony from Allen Graham, one of the bouncers at the bar that night, and Petitioner, along with testimony from

state witnesses, Corey Myers and Wayne Feaster, established by a preponderance of the evidence pursuant to the Act that Petitioner was immune from prosecution.

The testimony from these witnesses established that Dewayne Durant, also known as Thoro, and Corey Myers, were being attacked by men from Hemingway. Thoro was struck in the head with a beer bottle, knocked to the ground, and “jumped” on by multiple men. Myers was also attacked and knocked to the ground during the altercation. Having no duty to retreat pursuant to the Act, Petitioner, seeing his friends being attacked, came to their aid.

There is no evidence in the record to support the PCR judge’s finding that Thoro, Myers, and Petitioner were at fault in bringing on the difficulty. In her order denying Petitioner relief, the judge wrote, “Thoro, the person in whose defense [Petitioner] now claims to have acted, initiated both the original conflict and the second engagement outside . . . Thoro returned to the opposing group of combatants and reinitiated the confrontation.” App. 1105. The evidence presented at trial from both the state and the defense witnesses directly disputes this conclusion. Wayne Feaster, a state witness and the owner of the 3rd Avenue Sports Bar, testified that Jamal McFadden, the decedent, started the altercation inside the bar when he grabbed a pool stick during a dispute over a pool game. App. 166, l. 14 – 168, l. 17. After Feaster made the two opposing groups leave the bar, Thoro walked to his car. Feaster testified that after Thoro walked to his car, Damien Canty, who was later shot in the elbow, approached Thoro and struck him with a bottle. Thoro went “down pretty hard” and then was “jumped on” by three or four men. App. 168, l. 18 – 170, l. 20.

While Thoro was being attacked, some of the opposing combatants turned and began fighting Corey Myers, who was standing nearby. Feaster testified that Myers likewise “went down.” This is when Myers pulled a gun and Feaster thought Myers fired into the air. App. 170,

l. 21 – 171, l. 25. It was only while Thoro and Myers were being attacked that Petitioner approached the crowd and shot in self-defense and the defense of others. App. 172, l. 13 – 174, l. 16.

Corey Myers testified consistent with Feaster. He explained that after Feaster broke up the argument inside and ordered the two opposing groups to leave, Thoro walked outside alone. A group of men from Hemingway followed Thoro, “a big guy” struck Thoro with a bottle, and then the other men “rushed him.” App. 222, l. 25 – 224, l. 6. He specifically stated that the Hemingway group attacked Thoro first. App. 224, ll. 12-19. After Thoro was attacked, Myers retrieved his gun and came to Thoro’s aid. App. 224, l. 20 – 225, l. 10. Myers admitted that he ended up on the ground as well during the fight. App. 226, ll. 8-22.

Appellant testified consistent with Feaster and Myers. He explained that he only pulled his gun and fired upon the opposing men to protect Thoro and Myers who were being attacked and injured. Consequently, there is no evidence to support the PCR judge’s finding that Thoro, Myers, or Petitioner were at fault in bringing on the difficulty.

Moreover, there is no evidence to support the judge’s finding that “[n]o evidence was introduced at the trial or the evidentiary hearing to establish that Thoro was in fear for his life.” App. 1105. Myers testified that he felt threatened and believed he was going to be “seriously harmed” during the attack outside the bar. App. 226, l. 23 – 227, l. 2. He likewise believed that Thoro was being “seriously harmed” in the fight. App. 227, ll. 3-5. Any reasonable person would have believed he was in imminent danger of losing his life or sustaining serious bodily injury if he were being attacked by multiple men, at least one armed with a glass beer bottle. Therefore, there was sufficient evidence to support the second and third elements of self-defense.

Pursuant to the Act, neither Thoro, Myers, nor Petitioner had a duty to retreat. Since the other elements of self-defense were proven by a preponderance of the evidence, Petitioner established the necessary prejudice under Strickland.

Respectfully, this Court should hold the PCR judge erred, reverse Petitioner's convictions and sentence, and remand for a new trial.

**CONCLUSION**

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing. In the alternative, Petitioner requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy \_\_\_\_\_  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of October, 2020.